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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

KEVIN ANDRE BROWN,

Defendant and Appellant.

C081100

(Super. Ct. No. 13F00431)

A jury convicted defendant Kevin Andre Brown of committing the following offenses against the victim: three counts of forcible sodomy (Pen. Code, § 286, subd. (c)(2)),¹ rape (§ 261, subd. (a)(2)), sexual assault (§ 243.4, subd. (a)), false imprisonment (§ 236), robbery (§ 211), and unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)). The jury also found true the allegations defendant bound the victim during the rape and

¹ Undesignated statutory references are to the Penal Code.

sodomies. (§ 667.61, subd. (e)(5).) The trial court sentenced defendant to serve a state prison term of 66 years to life.

On appeal, defendant contends (1) the trial court erred by admitting evidence of two prior incidents of violence committed by defendant against the victim because they were not cohabitants, (2) expert witness testimony regarding studies about second-hand inhalation of crack cocaine vapors should not have been admitted into evidence, (3) he was deprived of his federal constitutional right to represent himself at sentencing, and (4) the trial court erred in imposing consecutive sentences for the rape and first sodomy because the evidence did not show the offenses were committed on separate occasions.

We conclude the trial court did not err in admitting prior acts evidence involving the same victim as in the current case. We further conclude defendant did not preserve the claim the trial court erred in allowing the prosecution's expert witness to testify about studies concerning the effects of second-hand inhalation of crack cocaine vapors. The trial court properly disallowed the defense from introducing evidence of the victim's tested level of cocaine metabolite without also introducing expert witness testimony to explain to the jury about the effects of the tested level of cocaine metabolite. The trial court did not abuse its discretion in denying defendant's untimely request for self-representation made for the first time on the day scheduled for sentencing. And we determine the trial court did not err in imposing consecutive sentences for the rape and first sodomy. Accordingly, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Prosecution Evidence

More than 20 years prior to trial, defendant married his wife, the victim's daughter. In 1995, the victim purchased an apartment building in Louisiana where she lived in the front apartment. Defendant, his wife, and their son lived together in the back

apartment. The victim had defendant cut a hole in the closet so that she could go back and forth between the apartments “to do laundry and whatever she needs to do.”

One day, defendant asked the victim to come and see something in the closet. At the closet, defendant tried to shove the victim inside. Defendant’s brother-in-law, the victim’s son, happened to be present and intervened.

On another occasion, the victim woke up to see defendant standing over her with a knife in his hand. As the victim said defendant’s name, he put his hand over her mouth. Defendant’s wife and brother-in-law ran into the victim’s apartment. As defendant’s wife attempted to take the knife from defendant, the victim was cut on her hand. The cut was deep enough to leave a scar. Defendant’s wife and brother-in-law and defendant kept “tussling with the knife” until the blade broke from the handle.

The victim testified she had known defendant to use crack cocaine in Louisiana. During both assaults, defendant seemed like a different person and behaved erratically. About defendant, the victim testified that “he’s a pretty decent person other than when he’s under the influence.”

As a result of the damage caused by Hurricane Katrina in 2005, the victim and her family – including defendant and his wife – moved to Sacramento to be near other family members. In 2012, defendant, his wife, and their son moved in with the victim at her residence in Sacramento.

On January 11, 2013, the victim came home from work around 5:30 p.m. As she walked inside, defendant surprised her and began punching her in the face. The victim attempted to fight back. Defendant put her into a chokehold and told her he was going to kill her if she did not stop fighting. Defendant choked the victim until she urinated on herself and lost consciousness. When the victim regained consciousness, she was lying on the floor with her arms tied behind her back and her legs taped up. Defendant put duct tape over the victim’s mouth.

Defendant asked for and received the victim's bank card and PIN. Defendant said the PIN "better be right" or he would "come back and get [her]." The victim scooted toward the kitchen to try to find something to help free herself.

Defendant returned within 15 minutes and found the victim in the kitchen. Even with duct tape over her mouth, the victim believed defendant understood what she was saying. Defendant dragged her back into the living room and tied her more tightly with a vacuum cleaner cord. Defendant paced for a few minutes before dragging the victim into a small bedroom. The windows were closed and there was no ventilation.

The victim asked defendant what he was doing. Defendant responded, "Shut up." Defendant smoked crack cocaine from a pipe for about 10 minutes. Defendant was so close to the victim she "inhaled whatever it was he was smoking." Defendant then pulled down the victim's pants. The victim told him, "Kevin, you don't want to do that."

Defendant used a telephone to call someone to tell the call recipient to "bring him some more." Defendant stepped outside and spoke with someone. After about 5 to 10 minutes, defendant returned. Defendant resumed smoking. The victim was lying on the bed with her pants pulled down.

Defendant took off his clothes and inserted his penis into the victim's vagina. He then inserted his penis into her anus. Defendant was smoking while he inserted his penis into her anus for the first time. "After a while, when he . . . couldn't get an erection, he stopp[ed] and started smoking" again. At some point, defendant licked her breast.

The victim testified defendant inserted his penis into her anus during three "different separate occasions." Between the second and third occasion, defendant "[j]ust smoked." Although defendant never achieved a full erection, the victim said he was most erect during the third insertion into her anus. After the third attempt, defendant appeared to get tired, got up, and began pacing again. The victim estimated the assault ended at 1:30 a.m.

The victim did not consent to sex or smoke crack cocaine with defendant.

Defendant freed the victim and then drove off in her vehicle. The victim informed defendant's wife of the assault and left the house. Defendant's wife called the police and the victim went to the Sutter Medical Center.

The victim was examined by physician's assistant Jennifer Joses around 5:00 a.m. on January 12, 2013. The victim reported she had not had consensual sexual intercourse within the previous 5 days, had not consumed alcohol within the previous 12 hours, and had not used drugs within the previous 96 hours. The victim's right eye showed a ruptured blood vessel consistent with receiving a direct blow or being choked. The victim had multiple bruises on her neck, right knee, and right arm. Joses did not observe any signs the victim was under the influence of cocaine.

The victim was bleeding at the opening of her cervix. She also had abrasions at the anal fold that were consistent with sexual assaults such as anal penetration. Joses collected several biological samples from the victim, including a urine sample and the victim's underwear.

At 11:00 a.m., defendant called his wife and said he was in Los Angeles. Defendant's wife testified that "he don't know what happened. All he knows is he was driving and when he really woke up, he was in LA. That's what he said." Defendant's wife arranged a three-way conference call including defendant, herself, and City of Sacramento Police Detective Newby. During the call, which was played for the jury, defendant stated he borrowed the victim's car. He admitted taking the victim's ATM card and money. He remembered driving to Los Angeles but not assaulting the victim. Defendant admitted he had ingested "drugs." He denied having sex with the victim or tying her up.

Defendant's wife testified she had never known the victim to ingest crack cocaine. Although defendant's wife had observed others to be under the influence of crack cocaine, she did not see any such signs in the victim after the assault.

Later, after defendant was taken into custody, he was interviewed by City of Sacramento Police Detective Terri Castiglia. During the interview, defendant acknowledged taking the victim's car and money from her bank account. Defendant admitted he had smoked crack cocaine on the day of the incident. Defendant stated he could not remember what had happened when the victim arrived home from work that day. Defendant noted his DNA had been collected and "if it matched up whatever they said I done, I must have done it."

Criminalist Sarah Porter testified as an expert witness in forensic examination of body fluids and tissues for controlled substances, including cocaine and cocaine metabolite. Porter's testing of the victim's urine sample revealed the presence of benzoylecgonine, a cocaine metabolite. Porter stated that "there are cases where people may come in contact with cocaine passively, such that they then have the cocaine or cocaine metabolite in their system as a result." Second-hand smoke from a crack cocaine user can cause the passive exposure. Porter described studies in which exposure to second-hand smoke or vaporized cocaine produced positive urine results. However, Porter did not opine about how the victim might have ingested or been exposed to cocaine.

Forensic testing matched defendant's DNA with a DNA profile on swabs taken from the victims' breast and rectal swabs.

Defense

During closing arguments, defendant's trial attorney argued the evidence was insufficient to convict defendant. Defense counsel argued the evidence showed the victim had smoked cocaine and the injuries she sustained "were more visible than they

look.” The defense theory was that the victim had smoked cocaine with defendant and then lied about it and the sexual assault.

DISCUSSION

I

The Victim’s Testimony Regarding Defendant’s Prior Acts of Violence Against the Victim

Defendant contends the evidence did not show he and the victim were cohabitants at the time he committed two acts of violence against her in Louisiana. Defendant further contends he received ineffective assistance of counsel because his trial attorney “failed to investigate the facts necessary to support his bonafide objection to the prior act evidence coming in under [Evidence Code] section 1109” We are not persuaded by the contentions.

A.

Procedural Background

Prior to trial, the prosecution moved to introduce evidence regarding defendant’s prior assaults on the victim in Louisiana under Evidence Code sections 1101, 1108, and 1109. Defense counsel objected. Defense counsel argued the evidence was inadmissible under Evidence Code section 1101 because it was not sufficiently similar to the charged offense and it did not involve domestic violence because the victim and defendant had never had a dating relationship. The prosecutor countered they were cohabitants under section 13700 because they were living together in a common location. The prosecutor argued the prior acts evidence showed defendant’s predisposition to commit acts of violence against the victim.

The trial court found defendant and the victim qualified as cohabitants and ruled the evidence admissible. The trial court found the probative value of the evidence outweighed any prejudicial impact.

At the close of evidence, the prosecution withdrew the request to instruct the jury with CALCRIM No. 852, evidence of prior acts of domestic violence. Instead, the trial court instructed the jury with CALCRIM No. 375 on whether the prior acts may be considered as evidence “for the limited purpose of deciding whether or not: [¶] The defendant had a motive to commit the offenses alleged in this case; or [¶] To show the reasonableness of the victim’s fear.”

B.

Admission of Prior Acts Evidence Against the Same Victim under Evidence Code Section 1101

1. General Rule

As a general rule, character evidence is not admissible to show propensity to prove criminal conduct on a specific occasion. (Evid. Code, § 1101, subd. (a).) Subdivision (b) of Evidence Code section 1101, provides an exception to the general rule by providing that “[n]othing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.”

“Admission of section 1101, subdivision (b) evidence is addressed to the sound discretion of the trial court. The trial court may exclude or admit this type of evidence pursuant to Evidence Code section 352 which provides: ‘The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.’ The trial court’s determination will not be disturbed on appeal absent a clear showing of an abuse

of discretion.” (*People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1609-1610 (*Linkenauger*).)

Linkenauger involved a defendant who was convicted of murdering his wife after a marriage “punctuated by [the defendant’s] use of physical force on her.” (32 Cal.App.4th at p. 1606.) The defendant in that case argued the trial court had erred in admitting evidence of his prior assaults on his wife. (*Ibid.*) The *Linkenauger* court rejected the argument and noted California Supreme Court decisions have held that “ ‘Evidence tending to establish prior quarrels between a defendant and decedent and the making of threats by the former is properly admitted . . . to show the motive and state of mind of the defendant. . . .’ ” (*Id.* at p. 1610, quoting *People v. Cartier* (1960) 54 Cal.2d 300, 311, and collecting authority.) The *Linkenauger* court concluded this rule “remains ‘good law’ after the California Supreme Court opinion in *People v. Ewoldt* (1994) 7 Cal.4th 380 (*Ewoldt*)” that held varying degrees of similarity are required when evidence of prior misconduct against different victims is offered to show intent, common design or plan, or identity. (*Linkenauger, supra*, at pp. 1606, 1612.)

The *Linkenauger* court affirmed the continuing validity of the rule that “[w]here a defendant is charged with a violent crime and has or had a previous relationship with a victim, prior assaults upon *the same victim*, when offered on disputed issues, e.g., identity, intent, motive, etcetera, are admissible based solely upon the consideration of identical perpetrator and victim without resort to a ‘distinctive modus operandi’ analysis of other factors.” (*Id.* at p. 1612, quoting *People v. Zack* (1986) 184 Cal.App.3d 409, 415 (*Zack*), italics added.) In contrast to the general rule of admissibility under Evidence Code section 1101, subdivision (b), that requires a similarity analysis for prior acts evidence against a different victim, “a broader range of evidence may be presented to show motive, intent, and identity *where the prior misconduct and charged offense*

involves the identical perpetrator and victim.” (Linkenauger, supra, at p. 1613, italics added.)

2. Evidence of Defendant’s Prior Assaults on the Same Victim

In this case, the evidence of defendant’s two prior assaults in Louisiana was properly admitted at trial under Evidence Code section 1101, subdivision (b), to show motive² and the victim’s fear.

Evidence of the prior assaults was relevant to proving defendant’s motive. Both of the prior assaults occurring in Louisiana were committed by the defendant against the same victim. During all three attacks, defendant was acting under the influence of cocaine when he physically assaulted his victim. The primary difference between the attacks was that defendant was thwarted during the Louisiana assaults but was able to continue his assault during the Sacramento attack. Although similarity is not required where the same victim is involved, we note the striking similarity here of defendant getting high on crack cocaine and assaulting the victim added to the probative value of the prior acts evidence. Further, the lapse of time between the Louisiana and Sacramento assaults did not diminish the probative value.

As to the victim’s fear, the prior assaults were relevant to show the reasonableness of the victim’s fear of defendant when he is using cocaine. Defendant argued the sexual encounter was consensual. The victim’s fear was relevant to show a lack of consent.

The prior acts evidence was not unduly prejudicial. The victim’s testimony regarding the prior assaults was brief. Moreover, the prior assaults against the victim paled in comparison to defendant’s conduct for the charged offenses that involved

² On the issue of motive, “[a] defendant is not entitled to have the jury determine his [or her] guilt or innocence on a false presentation that his [or her] and the victim’s relationship was peaceful and friendly. [Citation.]” (*People v. Fruits* (2016) 247 Cal.App.4th 188, 204.)

choking her to unconsciousness, tying her up, threatening “to get her,” and raping and sodomizing her over the course of several hours.

In short, the prior acts evidence was admissible under Evidence Code section 1101, subdivision (b).

C.

Prior Acts of Domestic Violence under Evidence Code Section 1109

Defendant also argues the trial court erred in admitting the evidence because defendant and the victim were not cohabitants within the meaning of Evidence Code section 1109. We do not need to address whether the trial court erred in allowing the prior acts evidence under Evidence Code section 1109 because the admissibility of the prior acts evidence in this case did not depend on Evidence Code section 1109. Instead, the prior acts evidence was admissible under Evidence Code section 1101, subdivision (b), and the trial court did not give the jurors an Evidence Code section 1109 instruction telling them they could consider the evidence to show propensity. The purposes for which the jury was told it could use the evidence was limited to valid Evidence Code section 1101, subdivision (b), purposes. Consequently, even if the trial court had erred in its analysis of admissibility under Evidence Code section 1109, the evidence would have been admissible under section 1101. “[W]e will affirm a judgment correct on any legal basis, even if that basis was not invoked by the trial court.” (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 269.)

The admissibility of the prior acts evidence under Evidence Code section 1101, subdivision (b), and limited purposes for which the jury was instructed it could use the evidence defeats defendant’s contention that he received ineffective assistance of counsel because his trial attorney did not object that Evidence Code section 1109’s cohabitant requirement was not met. (*People v. Cudjo* (1993) 6 Cal.4th 585, 616 [no ineffective assistance of counsel for failure to lodge an evidentiary objection to admissible

evidence].) And “we also reject defendant’s various constitutional claims. The routine and proper application of state evidentiary law does not impinge on a defendant’s due process rights.” (*People v. Riccardi* (2012) 54 Cal.4th 758, 809, overruled on another point by *People v. Rangel* (2016) 62 Cal.4th 1192.)

II

Expert Testimony Regarding Passive Inhalation of Cocaine Vapors

Defendant argues the trial court should have excluded expert witness testimony regarding studies about second-hand inhalation of cocaine vapors. In defendant’s view, the prosecution laid an inadequate foundation to show the studies were sufficiently similar to the circumstances of this case. In an included argument that lacks a proper subheading, defendant contends the trial court erred in preventing his trial attorney from cross-examining the expert witness about the level of cocaine metabolite found in the victim’s urine sample. We reject the arguments.

A.

Expert Witness Testimony Regarding Studies Involving Passive Inhalation of Cocaine Vapors

Prior to trial, the defense sought to introduce the testimony of criminalist Sarah Porter to show the victim’s urine tested positive for the presence of cocaine metabolite. The prosecution objected to the testimony unless the defense could show the victim was actually under the influence of that or any other drug in her system. The trial court indicated it would allow Porter to testify about the presence of cocaine metabolite in the victim’s urine sample.

During trial and outside the presence of the jury, the trial court conducted a hearing on the admissibility of Porter’s testimony – including her testing of the victim’s urine sample and her reliance on studies involving passive inhalation of cocaine. Porter testified about the studies without objection. In response to a question about whether

there were *additional* studies supporting the passive inhalation theory, defense counsel objected on grounds of foundation. The objection was overruled and the trial court allowed Porter to testify in front of the jury. In so ruling, the trial court noted Porter's training, skill, and expertise.

In front of the jury, Porter explained the victim's urine tested positive for the presence of cocaine metabolite. Porter did not express an opinion as to how the victim had come to have cocaine metabolite in her system. Porter testified about studies involving passive inhalation of cocaine vapors through second-hand exposure. Defendant's trial attorney did not make an objection to Porter's testimony regarding second-hand exposure to cocaine vapors.

B.

Porter's Testimony Regarding Passive Inhalation Studies

To preserve an evidentiary issue for review, a defendant must make a timely objection on the same ground as to be raised on appeal. (*In re S.C.* (2006) 138 Cal.App.4th 396, 406.) Even if a defendant makes an objection prior to trial, the defendant generally must renew an objection to preserve the claim. (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1140 (*Zambrano*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390.) *Zambrano* involved testimony during a jury trial by the attempted murder victim. (*Id.* at pp. 1092, 1139-1140.) The defendant in *Zambrano* argued on appeal that victim's testimony should have been excluded for lack of personal knowledge on grounds of that victim's faulty memory. (*Id.* at p. 1139.) Although the defense had objected on that ground during the preliminary hearing, the objection was not renewed during trial. The Supreme Court deemed the issue forfeited:

"The claim is forfeited because defendant did not object at trial to the introduction of [that victim]'s testimony. (Evid. Code, § 353, subd. (a); *People v. Cudjo* (1993) 6 Cal.4th 585, 622 [defendant must raise claim of testimonial incompetence at trial].) At

the preliminary hearing, defendant was permitted to examine [that victim] on the issue of his ‘competency’ to testify. Following that examination, the preliminary hearing court found [that victim] ‘qualified to testify from his personal knowledge.’ Absent a ruling or stipulation that an objection to such testimony would be deemed renewed at trial, defendant’s failure to renew it means the issue was not preserved for appeal.”

(*Zambrano, supra*, 41 Cal.4th at p. 1139.) The same reasoning applies here.

Defendant’s single objection on grounds of foundation during the trial court’s hearing under Evidence Code section 402 did not suffice to preserve the issue for appeal. In front of the jury, the prosecution explored Porter’s qualifications and specifics of the cited scientific studies at length. An evidentiary foundation objection to this testimony in front of the jury was necessary to allow the claim to be raised on appeal. (Evid. Code, § 353; *Zambrano, supra*, 41 Cal.4th at p. 1139.)

Moreover, the single objection on grounds of foundation during the Evidence Code section 402 hearing did not relate to the two passive inhalation studies defendant challenges on appeal. Instead, the foundation objection related only to the prosecution’s question regarding whether there “are *other* studies related to passive inhalation, correct, *maybe with relation to an emphasis on small children.*” (Italics added.) Thus, defense counsel’s objection focused only on studies other than those challenged by defendant on appeal. Consequently, the objection was not sufficient to preserve defendant’s argument for appeal.

C.

Cross-examination Regarding the Results of the Victim’s Urine Sample

Defendant asserts the trial court erred when it “precluded defense counsel from eliciting evidence to show the disparity between the actual quantity of drug found in [the

victim's] urine as compared to the trace amounts found in the urine of subjects of the second-hand smoke experiment[s]." We disagree.

During the Evidence Code section 402 hearing, defendant's trial attorney argued he should be allowed to introduce evidence of cocaine metabolites in the victim's system to show she was lying *and* to show she was under the influence of cocaine. The trial court ruled it would allow Porter to testify about the presence of cocaine metabolite in the victim's urine sample. As to defense counsel's proposed argument the victim was under the influence of cocaine, the trial court asked of the defense:

"Are you planning on having an expert who's going to tie it all together, that if [the victim] tested for cocaine at a certain point in time, like a DUI case, can you kind of extrapolate backwards and say she was, therefore, under the influence of cocaine metabolites at the time of the alleged offense and that it's a reasonable inference for the jury to assume that she had drugs in her system at the time of the offense? Otherwise all you've got is this lab test."

Defense counsel indicated he did not plan to introduce such expert testimony and did not believe it was necessary to do so. The trial court responded: "[Y]ou were going to try to make the argument that because [the victim] had cocaine in her bloodstream at the time of the test, she was, therefore, under the influence at the time of the incident. [¶] And I don't think a jury can make that conclusion in the absence of expert testimony. Now, if you want to point out the fact that she lied and at least said she didn't have drugs in her system and then the tests come back positive for cocaine, I think that's fair game. But for the other purpose, in the absence of expert testimony, I don't think you can get there."

" 'In determining the admissibility of evidence, the trial court has broad discretion. . . . A trial court's ruling on admissibility implies whatever finding of fact is prerequisite thereto. . . .' (*People v. Williams* (1997) 16 Cal.4th 153, 196 (*Williams*)). 'We review

the trial court’s conclusions regarding foundational facts for substantial evidence. [Citation.] We review the trial court’s ultimate ruling for an abuse of discretion [citations], reversing only if “ ‘the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.’ ” [Citation.]’ (*People v. DeHoyos* (2013) 57 Cal.4th 79, 132.)” (*People v. Jackson* (2016) 1 Cal.5th 269, 320-321.)

We do not discern an abuse of discretion by the trial court in disallowing defense counsel to introduce evidence regarding the relative quantities of cocaine metabolites found in scientific study participants and the victim’s urine sample. “The probable effect of intoxicants other than alcohol is a topic ‘sufficiently beyond [the] common experience’ of most jurors that expert testimony is required. (Evid. Code, § 801, subd. (a); *People v. Cox* (1990) 221 Cal.App.3d 980, 989; see *People v. Balderas* (1985) 41 Cal.3d 144, 191-192, superseded on other grounds in Civ. Proc. Code, § 223.)” (*Pedefferri v. Seidner Enterprises* (2013) 216 Cal.App.4th 359, 374.) The trial court did not err in excluding evidence that lay beyond the common experience of jurors to evaluate.

III

Denial of Defendant’s Faretta³ Motion

Defendant argues the trial court deprived him of his constitutional right to self-representation. We disagree.

A.

Defendant’s Request for Self-representation

Defendant was convicted on November 23, 2015. On January 4, 2016, the day scheduled for sentencing, defendant indicated to the court that he wanted to personally

³ *Faretta v. California* (1975) 422 U.S. 806, 834 [45 L.Ed.2d 562] (*Faretta*).

file a motion for new trial. The trial court reminded defendant he was represented by legal counsel. Defendant's trial attorney stated he did not plan to file a motion for new trial because he had not identified any meritorious issues to argue.

Defendant indicated he wanted to relieve his attorney and represent himself. Defendant proceeded to explain why he believed he had meritorious grounds for a new trial motion. Defendant concluded, "I just don't want him representing me." Defense counsel argued that granting defendant's self-representation motion would be "extremely prejudicial" to defendant because defendant did not understand the legal issues of the case. The trial court noted that "[t]he right to self-representation may be invoked by any defendant competent to stand trial." Nonetheless, the trial court denied the motion as untimely and explained:

"I am going to deny [defendant's] Faretta motion. I find that the motion itself is not timely. It is made for the first time at the scheduled date for judgment and sentencing. [¶] As the record previously indicated, this matter has been continued for – or had been pending for six weeks, since the jury reached a verdict, and [defendant] did waive time for purposes of this hearing this morning, so it has been about six weeks."

The trial court further stated, "I will note that [defendant] did also indicate that, on some of his grounds for a new trial, he would like to have additional time and confer with counsel. [¶] So at this point, the Court is going to deny [defendant]'s Faretta motion as untimely."

Although the trial court denied the motion for self-representation, the court nonetheless allowed defendant to orally argue his motion for a new trial. The trial court found the motion was not properly before the court, and to the extent it was properly before the court it lacked merit.

B.

Right to Self-representation

Criminal defendants have a constitutional right to represent themselves. (*Faretta*, *supra*, 422 U.S. at p. 834.) As the *Faretta* court explained, “The right to defend is personal. The defendant, and not his [or her] lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his [or her] particular case counsel is to his [or her] advantage. And although he [or she] may conduct his [or her] own defense ultimately to his [or her] own detriment, his [or her] choice must be honored out of ‘that respect for the individual which is the lifeblood of the law.’ ” (*Ibid.*, quoting *Illinois v. Allen* (1970) 397 U.S. 337, 350-351 [25 L.Ed.2d 353].)

Trial courts, however, have discretion to deny untimely motions for self-representation. (*People v. Miller* (2007) 153 Cal.App.4th 1015, 1024.) A motion for self-representation that is made after a guilty verdict is timely only if made “a reasonable time prior to the commencement of the sentencing hearing.” (*Ibid.*) In considering a motion for self-representation, the trial court should consider the totality of the circumstances in including the amount of time between the self-representation motion and scheduled sentencing date, readiness of the defendant to proceed, and whether the defendant could have earlier asserted his or her right of self-representation. (See *People v. Lynch* (2010) 50 Cal.4th 693, 726, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 637.)

C.

Defendant’s Motion

The trial court did not err in denying defendant’s motion for self-representation as untimely. Six weeks elapsed after defendant was convicted and before he appeared at sentencing. However, the record does not indicate defendant filed his motion prior to the

date scheduled for sentencing. Moreover, defendant articulated no reason why his motion for self-representation could not have been brought on a more timely basis prior to the date of sentencing. Instead, defendant indicated a granting of self-representation would have injected additional delay because he wanted trial transcripts prepared. Based on the circumstances, the trial court was within its discretion to deny self-representation. (*People v. Doolin* (2009) 45 Cal.4th 390, 454–455 [motion for self-representation made on the day of the sentencing hearing was untimely].)

IV

Consecutive Sentences for Rape and Sodomy

Defendant argues the trial court erred in imposing consecutive sentences for the rape and first act of sodomy against the victim. Defendant asserts the evidence does not support a finding the two incidents were separate offenses under section 667.6, subdivision (d). We disagree.

Section 667.61 requires “a consecutive sentence for each offense . . . if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6.” (§ 667.61, subd. (i), italics added.) Subdivision (d) of section 667.6 provides: “In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether . . . the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.”

The California Supreme Court has explained that “[u]nder the broad standard established by . . . section 667.6, subdivision (d), the Courts of Appeal have not required

a break of any specific duration or any change in physical location. Thus, the Court of Appeal herein cited *People v. Irvin* (1996) 43 Cal.App.4th 1063, 1071, for the principle that a finding of ‘separate occasions’ under . . . section 667.6 does not require a change in location or an obvious break in the perpetrator’s behavior: ‘[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter.’ Similarly, the Court of Appeal in *People v. Plaza* (1995) 41 Cal.App.4th 377, 385, affirmed the trial court’s finding that sexual assaults occurred on ‘separate occasions’ although all of the acts took place in the victim’s apartment, with no break in the defendant’s control over the victim. (But see *People v. Pena* (1992) 7 Cal.App.4th 1294, 1316, 9 Cal.Rptr.2d 550 [defendant’s change of positions between different sexual acts was insufficient by itself to provide him with a reasonable opportunity to reflect upon his actions, ‘especially where the change is accomplished within a matter of seconds’]; *People v. Corona* (1988) 206 Cal.App.3d 13, 18 [holding, after the respondent implicitly conceded the point, that the trial court erred in imposing consecutive sentences for different sexual acts when there was no cessation of sexually assaultive behavior ‘between’ acts].)” (*People v. Jones* (2001) 25 Cal.4th 98, 104-105.)

We deferentially review the trial court’s factual finding regarding whether the sex offenses were separately committed. As this court has previously observed, “Once a trial judge has found under section 667.6, subdivision (d), that a defendant committed offenses on separate occasions, we may reverse only if no reasonable trier of fact could have decided the defendant had a reasonable opportunity for reflection after completing an offense before resuming his [or her] assaultive behavior.” (*People v. Garza* (2003) 107 Cal.App.4th 1081, 1092.) Under this deferential standard of review, we conclude the trial court did not err in imposing consecutive sentences for the rape and first count of sodomy against the victim.

Defendant's four convictions for rape and sodomy arose out of his six-and-a-half hour sexual assault of his victim. The record indicates defendant had time to reflect between each of his instances of rape and sodomy. As pertinent to defendant's contention, defendant inserted his penis into the victim's vagina while he was in front of her. Defendant then changed his position and moved to a position behind the victim. While he was doing this, defendant was smoking crack cocaine. Defendant had difficulty achieving an erection. He persisted until he was able to penetrate her anus with his penis. The victim's testimony indicates the amount of time defendant spent after vaginal penetration and before the sodomy when she stated, "After a while, when he . . . couldn't get an erection, he stopp[ed] and started smoking" again. This testimony indicates a substantial time lapse before the penetration for which he was convicted of sodomy and is consistent with a series of sexual assaults spanning more than six hours. Accordingly, the trial court did not err in imposing consecutive sentences.

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
BUTZ, Acting P. J.

/s/
MURRAY, J.